

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of

Brad Smith for Congress  
and James Bailey, in his official capacity  
as Treasurer; and  
Bradley Smith

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C.

**CONCILIATION AGREEMENT**

This matter was initiated by a complaint filed with the Federal Election Commission ("the Commission") by John Truscott. The Commission found reason to believe that Brad Smith for Congress and James Bailey, in his official capacity as Treasurer, and Bradley Smith ("Respondents") violated 2 U.S.C. § 441a(f) by accepting excessive contributions pursuant to an erroneous claim of eligibility for higher than normal contribution limits under the so-called millionaires' amendment to the Federal Election Campaign Act of 1971, as amended ("the Act").

NOW, THEREFORE, the Commission and Brad Smith for Congress and James Bailey, in his official capacity as Treasurer, and Bradley Smith, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

### **Background**

1. Bradley Smith was a candidate for the Republican Party's nomination for the House of Representatives from the Michigan 7th Congressional District in 2004.

2. Brad Smith for Congress ("the Committee") is a political committee within the meaning of 2 U.S.C. § 431(4). It was the authorized committee for Bradley Smith's 2004 candidacy.

3. James Bailey is the treasurer of Brad Smith for Congress.

4. Gene DeRossett was one of Mr. Smith's opponents in the 2004 Republican primary election for the Michigan 7th Congressional District. Mr. DeRossett's authorized campaign committee was DeRossett for Congress.

5. On September 30, 2003, Mr. Smith made a \$100,000 personal loan to the Committee. On March 31, 2004, Mr. Smith made another \$40,000 personal loan to the Committee. Resp. at 1. On April 22, 2004, the Committee repaid \$50,000 of Mr. Smith's personal loans.

6. Mr. DeRossett made a series of personal loans totaling \$451,000 to DeRossett for Congress prior to April 19, 2004, when he filed an FEC Form 10 with the FEC. The treasurer of Mr. DeRossett's campaign committee asserted in a June 2, 2004 letter to the FEC that his committee had also notified his opponents, including Mr. Smith, that his expenditures from personal funds had surpassed \$350,000.

### **The Law**

7. During 2004, with the limited exception discussed below, individual contributions to candidates for the U.S. House of Representatives were limited to \$2,000 per

election. 2 U.S.C. § 441a(a)(1). Candidates for federal office and their political committees are prohibited from knowingly accepting contributions in excess of the legal limits. 2 U.S.C. § 441a(f).

8. Pursuant to the recently implemented “millionaires’ amendment” to the Bipartisan Campaign Reform Act of 2002, a candidate for the U.S. House of Representatives might be permitted to raise contributions under special increased contribution limits if he or she has an opponent that has spent more than \$350,000 of personal funds on his or her campaign. 2 U.S.C. § 441a-1(a). In order to determine whether the candidate is eligible for increased contribution limits, the authorized political committee and the candidate must compute the “opposition personal funds amount” (“OPFA”) pursuant to the appropriate formula set forth in Commission regulations which implement 2 U.S.C. § 441a-1(a). See 11 C.F.R. § 400 et. seq. Only if the OPFA exceeds \$350,000 is the candidate eligible for increased contribution limits.

9. There are different formulas for calculating the OPFA based on the time at which it is being calculated and taking into account funds raised through contributions by each campaign. In this matter, the OPFA was being calculated in June of 2004, the year of the general election, so the applicable calculation was set forth in 11 C.F.R. § 400.10(a)(3):

(3) To compute the opposition personal funds amount from February 1 of the year in which the general election is held to the day of the general election, one of the following formulas must be used:

- (i) If  $e > f$ , opposition personal funds amount =  $a - b - ((e - f) \div 2)$ .
- (ii) If  $e \leq f$ , opposition personal funds amount =  $a - b$ .

10. The variables to be used in the formulas laid out in 11 C.F.R. § 400.10(a) are set forth in 11 C.F.R. § 400.10(b), as follows:

(b) *Variables.* The variables used in the formulas set out in paragraph (a) of this section are defined as follows:

a = Greatest aggregate amount of expenditures from personal funds made by the opposing candidate in the same election.

b = Greatest aggregate amount of expenditures from personal funds made by the candidate in the same election. ...

e = Aggregate amount of the gross receipts of the candidate's authorized committee minus any contributions by the candidate from personal funds as reported under 11 CFR 104.19(b)(2)(v) or (vi), during any election cycle that may be expended in connection with the election for the nomination for election, or election, to Federal office sought, as determined on December 31 of the year preceding the year in which the general election is held.

f = Aggregate amount of the gross receipts of the opposing candidate's authorized committee minus any contributions by that opposing candidate from personal funds as reported under 11 CFR 104.19(b)(2)(v) or (vi), during any election cycle that may be expended in connection with the election for the nomination for election, or election, to Federal office sought, as determined on December 31 of the year preceding the year in which the general election is held.

11. On April 19, 2004, Smith's opponent, Mr. DeRossett filed a Form 10 (Notice of Expenditures from Personal Funds) reflecting \$451,000 in loans that constituted expenditures from personal funds with the Commission. Although the DeRossett campaign reports sending a copy of the Form 10 to all of their opponents in the Republican primary, Respondents contend that they have no recollection of receiving the Form 10.

12. On April 22, 2004, Smith's Committee repaid Smith \$50,000 of the \$140,000 total that he had loaned his Committee.

13. Brad Smith for Congress and James Bailey, in his official capacity as Treasurer, and Bradley Smith (collectively "Respondents") assert that they first became aware of Mr. DeRossett's Form 10 sometime in May when they viewed it on the FEC website.

14. In calculating the OPFA, Respondents correctly used the "a-b" formula in 11 C.F.R. § 400.10(a)(3)(ii). In that formula "a" is the "greatest aggregate amount of expenditures from personal funds made by the opposing candidate" [whose large personal

contributions may have triggered the millionaires' amendment], and "b" is the "greatest aggregate amount of expenditures from personal funds made by the candidate" [seeking higher limits]. In this case, "a" would be Mr. DeRossett's personal expenditures for his campaign and "b" would be Mr. Smith's personal expenditures for his campaign.

15. Pursuant to the formula published at 11 C.F.R. § 400.10(a)(3)(ii), variables "a" and "b" require the candidate to use the "greatest aggregate amount of expenditures from personal funds" in calculating the OPFA. Therefore, Respondents should have used the full \$140,000 amount that Mr. Smith loaned his campaign in determining the OPFA. The correct formula yields an OPFA of less than \$350,000. Therefore, Respondents were not eligible for increased contribution limits under 2 U.S.C. § 441a-1(a).

16. Respondents maintain that for purposes of calculating the OPFA, they misunderstood the term "aggregate" loans to mean "net" loans. In support, Respondents believed that the Act did not require the use of the greatest aggregate amount of expenditures from personal funds. Rather, Respondents drew a distinction between the use of the term "greatest aggregate amount" in the description of the opposing candidate's expenditures from personal funds in 2 U.S.C. § 441a-1(a)(2)(A)(i) and the use of the term "aggregate amount" in the description of the candidate's expenditures from personal funds in 2 U.S.C. § 441a-1(a)(2)(A)(ii).

17. Respondents believed that such a conclusion was supported by the use of the term "aggregate" in other portions of the regulations as they apply to loans to campaigns, which they believed was the precise fact at issue. In support of the contention that repaid loans are not a

contribution or expenditure under the Act or regulations, Respondents relied on 11 C.F.R.

§ 100.52(b)(2), which states:

**A loan is a contribution at the time it is made and is a contribution to the extent that it remains unpaid.** The aggregate amount loaned to a candidate or committee by a contributor, when added to the other contributions from that individual to that individual or committee, shall not exceed the contribution limitations as set forth at 11 C.F.R. part 110. **A loan, to the extent it is repaid, is no longer a contribution.** [emphasis added]

Although the OPFA is a broader concept than “contributions,” Respondents believed that these regulations explicitly excluded loan repayments when determining the aggregate amount of loans.

18. Respondents contend that they had a brief and casual conversation with an attorney purportedly specializing in campaign finance law. Respondents contend that the attorney, during the course of a phone call, agreed that their interpretation of the law was one possible interpretation. Respondents have declined to waive the attorney-client privilege and provide verification of the advice.

19. Respondents also contacted the Commission for an answer to the question on June 10, 2004. The Commission’s Reports Analysis Division (“RAD”) did not have an immediate answer, but RAD agreed to research the question and call the Committee back on June 15, 2005. On June 15, 2005, RAD attempted to call the telephone number provided by Respondents, but the Committee's telephone went unanswered on that day. Neither RAD nor Respondents followed up on the matter.

20. Respondents contend they had a good faith belief that they were complying with the law.

21. Between June 10, 2004 and August 2, 2004, Respondents accepted \$40,500 in contributions above the normal limits. See Exhibit A.

V. Solely for the purpose of avoiding litigation and settling this matter prior to a probable cause to believe finding, Respondents agree not to contest the Federal Election Commission's reason to believe finding that they violated 2 U.S.C. § 441a(f).

VI. Respondents will pay a civil penalty to the Federal Election Commission in the amount of fourteen thousand dollars (\$14,000), pursuant to 2 U.S.C. § 437g(a)(5)(A). Further, Respondents will cease and desist from violating 2 U.S.C. § 441a(f).

VII. Respondents have voluntarily begun refunding all contributions, and as part of this conciliation agreement, Respondents will refund to contributors or seek reattribution (as set forth below) for all contributions in excess of the normal limits by June 15, 2005. In lieu of a refund, Respondents may request a reattribution to a spouse for any eligible contribution, provided that the following conditions apply: (i) the original contribution was made on a joint checking account; (ii) the spouse does not exceed the normal contribution limit as a result of the reattribution; (iii) the spouse signs a written document consenting to the reattribution; and (iv) Respondents agree to refund any excess contribution within 30 days following any requested reattribution that is either rejected or not responded to within 30 days of the request. To the extent that any excess contributions cannot be refunded, Respondents will disgorge the excess contributions to the United States Treasury.

VIII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof

has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

IX. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

X. Respondents shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

XI. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Lawrence H. Norton  
General Counsel

7/12/05  
Date

BY: Rhonda J. Vosdigh  
Rhonda J. Vosdigh  
Associate General Counsel

FOR THE RESPONDENT:

Bruce Smith

June 3, 2005  
Date



Excessive Contributions of \$6,000

Date	Name	Contribution Amount	Excessive Amount
6/10/2004	Lobkowitz, Philip	\$6,000.00	\$4,000.00
6/14/2004	Capra, James	\$6,000.00	\$4,000.00
6/18/2004	Daniels, George	\$6,000.00	\$4,000.00
6/18/2004	Kohler, Terry	\$6,000.00	\$4,000.00
6/18/2004	Smeads, Larry	\$6,000.00	\$4,000.00
6/18/2004	Sinquefield Rex	\$6,000.00	\$4,000.00
6/30/2004	Sinquefield, Jeanne	\$6,000.00	\$4,000.00
7/30/2004	Rhodes, Thomas	\$6,000.00	\$4,000.00
8/2/2004	Searle, Dan	\$6,000.00	\$4,000.00
Totals		\$54,000.00	\$36,000.00

Excessive Contributions - More than \$2,000

Date	Name	Contribution Amount	Excessive Amount
6/30/2004	Beznos, Harold	\$2,500.00	\$500.00
7/27/2004	Smith, Diane	\$4,000.00	\$2,000.00
7/30/2004	Conner, Barry	\$2,000.00	
7/30/2004	Conner, Barry	\$2,000.00	\$2,000.00
Totals		\$10,500.00	\$4,500.00
		\$64,500.00	\$40,500.00

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